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REPORT ON RECENT ETS  
AND IAQ DEVELOPMENTS

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August 6, 1993

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## REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

### IN THE UNITED STATES

#### REGULATORY AND LEGISLATIVE MATTERS

##### 103D CONGRESS

#### [1] Senate Attaches PRO-FEDS Bill to Appropriations Bill

On August 3, 1993, the Senate voted to add Senator Frank Lautenberg's (D-N.J.) "PRO-FEDS" (S. 262) legislation as an amendment to the Treasury, Post Office and General Government Appropriations Bill (H.R. 2403). The Senate has not yet voted on H.R. 2403 and was not expected to do so prior to adjourning for its recess scheduled to begin August 6. The Congress is expected to reconvene on September 9.

The PRO-FEDS amendment, which is virtually identical to the original bill, would restrict smoking to separately ventilated areas in all federal buildings. The only provisions that differ in the amendment are the addition of an exemption for VA hospitals and the deletion of a section establishing an Environmental Tobacco Smoke Advisory Office at EPA. For further details of the "PRO-FEDS" bill, see issue 40 of this Report, February 5, 1993.

In 1992, Senator Lautenberg was able to add his PRO-KIDS legislation to the Labor-HHS-Education Appropriations bill. The amendment was later dropped during House and Senate negotiations. See issue 32 of this Report, October 9, 1992.

#### [2] Traficant Bill Faces Challenges

Several committees have reportedly asked that the bill introduced by Representative James Traficant (D-Ohio) to ban smoking in federal buildings (H.R. 881) be referred to them before it reaches the House floor. The measure was approved by the House Public Works Committee on June 17, 1993. See issue 50 of this Report, June 25, 1993. According to press reports, Traficant recognizes that opponents of the bill are

eager to land it in a hostile committee. Committees that have already expressed an interest in considering the bill include Government Operations and Science, Space and Technology. See *Congressional Quarterly Weekly Report*, July 17, 1993.

Traficant has introduced extensions to the remarks section for the bill in the Congressional Record. Citing the EPA Risk Assessment on ETS in his remarks, he urged Congress to approve H.R. 881 this year and stated that officials from the Department of Labor testified during subcommittee hearings that the Federal Government has paid hundreds of thousands of dollars in workers' compensation claims to nonsmoking employees who claimed they were disabled due to ETS exposure. See *Congressional Record*, E-1856 (July 26, 1993).

#### [3] IAQ Act of 1993 is Approved in Senate Committee

The Indoor Air Quality Act of 1993 (S. 656), introduced by Senator George Mitchell (D-Me.) in March, was approved on July 30, 1993, by the Senate Environment and Public Works Committee. The bill has not been assigned to any other committee; presumably, it will now go to the full Senate. For a discussion of the provisions of the bill as originally introduced, see issue 44 of this Report, April 2, 1993.

The bill that was approved contained an amendment introduced by Senators Mitchell, John Chafee (R-R.I.) and Joseph Lieberman (D-Conn.). The amendment would, among other matters, (i) clarify the listing of indoor air contaminants and extend the time for listing from 240 days to 18 months after enactment; (ii) allow an additional six months for development of the first set of health advisories; (iii) require that any health advisory be based on scientific information that has undergone peer review; (iv) delete the requirement for a new office of indoor air quality at EPA; and (v) delete the provision for the Council on Indoor Air Quality to report to Congress on the progress of indoor air quality programs.

Although the bill does not provide any direct authority for EPA to regulate indoor air quality issues, it does

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give the agency the authority to coordinate the development of a national strategy for combating sick building syndrome and related health complaints. Representative Joseph P. Kennedy II (D-Mass.) introduced companion House legislation in May 1993 (H.R. 1930). The House bill was referred to three House committees: Energy and Commerce; Science, Space and Technology; and Education and Labor. As of this writing, no hearings had been scheduled on H.R. 1930. See *BNA Daily Labor Report*, August 2, 1993.

#### [4] House Subcommittee Holds Hearing Held on Airplane IAQ

On July 30, 1993, a House subcommittee conducted a hearing to consider whether reductions in fresh air supplies aboard commercial airliners are causing health problems, including the spread of infectious diseases such as tuberculosis. A United Airlines flight attendant who testified at the hearing said she has become more aware of air quality complaints since the 1990 ban on smoking on most domestic flights. She suggested that air quality complaints prior to the ban were disguised by the smoke.

Federal Aviation Officials and a representative of the Centers for Disease Control and Prevention testified that there is no evidence that air travel puts a person at a higher risk of contracting infectious diseases.

According to Representative Tim Valentine (D-N.C.), the subcommittee chair, this investigation was prompted by a report in *The New York Times* which said that airlines, to save money, are circulating less fresh air into the cabins of many airplanes. Newer aircraft reportedly provide half fresh air and half recirculated air that is freshened every six or seven minutes. Aircraft built before the mid-80's provided cabins with 100 percent fresh air that was circulated every three minutes.

Flight attendants and passengers reportedly testified during the hearing that they have suffered such problems as nausea, dizziness, headaches and other ailments from breathing the dry, pressurized, recirculated air in air cabins. Contaminants of concern to federal investigators include high concentrations of ozone, carbon dioxide and microbiological aerosols and viruses.

The hearing was before the House Subcommittee on Technology, Environment and Aviation. See *The New York Times*, July 26, 1993; *Newsday*, July 30, 1993.

#### [5] Risk Assessment is Subject of Congressional Hearing

On July 28, 1993, a subcommittee of the House Science, Space and Technology Committee conducted a hearing on the role of risk assessment in the regulatory process. Testifying at the hearing were representatives of public interest groups, including the Carnegie Commission on Science, Technology and Government, the Institute for Evaluating Health Risk and the Center for Media and Public Affairs.

One of the witnesses referred to the EPA Risk Assessment on ETS and criticized the report for focusing too much on the accuracy of the number of estimated cancer cases. According to this witness, the major public health concern of the report should be the size of the population of infants and children allegedly at risk of respiratory disease.

A witness for the Center for Media and Public Affairs noted that his organization recently analyzed scientific opinion vs. media coverage of environmental cancer risks and reported that some 59 percent of scientists believe the media accurately portrays the alleged cancer risk of tobacco and ETS, while 36 percent said that the media understates the purported risks.

A witness for the Carnegie Commission discussed its recently released report entitled "Risk and the Environment: Improving Regulatory Decision Making," in which the usefulness of risk analysis in setting a regulatory agenda was acknowledged. The report, however, called for the recognition of limitations on risk analysis in a democratic society. E. Donald Elliott, a former EPA employee who was speaking for the Carnegie Commission, was critical of the current practice of communicating risk estimates as a worst case scenario and recommended that risk ranges be publicized instead to improve the legitimacy of risk assessments.

#### [6] Architect to Designate Smoking Area in Rayburn Building

According to a press report, the Architect of the Capitol is expected to designate a test site for smoking in the Rayburn Building, following the ban imposed on the House side of the Capitol by the Speaker in May 1993. See issue 47 of this Report, May 14, 1993. The House Building Commission reportedly decided

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to analyze the demand for smoking sections by establishing the Rayburn test site before spending money to construct separately-ventilated smoking sections in other House buildings. A reporter has evidently been told that staffers, since the ban took effect, have discovered numerous hiding places throughout the buildings where they can smoke undetected. *See Roll Call*, July 19, 1993.

## U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

### [7] ASH Files New Petition For Emergency Temporary Standard on ETS

On July 12, 1993, ASH filed a petition with OSHA demanding that the agency issue an emergency temporary standard prohibiting smoking in all indoor workplaces. ASH points out in its petition that it last petitioned for an emergency temporary standard on ETS in 1987, and alleges that there is considerably more evidence now, including the EPA Risk Assessment on ETS, that ETS poses a "serious risk of cancer, heart disease, various respiratory illnesses and other grave dangers to employees."

ASH purports to link ETS exposure to lung cancer, cervical cancer, tumors of the brain, nasal sinus, breast, endocrine glands, and hematopoietic tissues, leukemia, lymphoma, and heart disease. The petition alleges that ETS causes 53,000 deaths each year, making it the third major cause of all U.S. deaths. ASH acknowledges that many state and local governments and private employers have banned smoking in the workplace, but argues "this piecemeal haphazard approach is totally unsatisfactory."

The petition also contains allegations that ventilation will not remove ETS from the workplace and that a total workplace smoking ban will be cost effective in the long run given purported savings from "health care cost containment, fire loss prevention, reduced legal costs and even decreases in janitorial costs." Attachments to the petition include the EPA report on ETS, a statement to ASH by then-candidate Bill Clinton, ASH petitions to OSHA dated February 26, 1992, March 10, 1992, and July 31, 1992, and statements by former Secretary of Labor Lynn Martin and former EPA Administrator William Reilly.

### [8] *ASH v. OSHA*: ASH Responds to OSHA's Motion to Govern Further Proceedings

On July 29, 1993, ASH filed a response in opposition to OSHA's request that the court continue to hold the case in abeyance. Characterizing OSHA's assertions that the Secretary of Labor has not determined whether or how to regulate ETS in the workplace as "an insult to this Court," ASH demands that the court intervene to force OSHA to commence rulemaking on ETS. ASH observes that OSHA's request is actually a request for an indefinite stay and states in this regard that OSHA has failed to discuss the factors set forth in General Rule 7(h) of the D.C. Circuit Court.

ASH continues to cite the EPA risk assessment on ETS to support its claims about health risks to workers, and updates its allegations with references to the recent Congressional testimony of Administrator Carol Browner in defense of the EPA risk assessment, the Supreme Court decision in *Helling v. McKinney*, 61 U.S.L.W. 4648 (U.S. 6/18/93), and a study appearing in the *Journal of the American Medical Association* regarding the risk of lung cancer for waiters and bartenders exposed to ETS. *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992.)

► JAMA Study, item 33.

### [9] House Holds Hearing on OSHA Reform Legislation

On July 29, 1993, the House Committee on Education and Labor held a hearing on H.R. 1280, the Comprehensive Occupational Safety and Health Reform Act. Those testifying included Thomas Donahue, secretary-treasurer of the AFL-CIO, who reportedly told lawmakers that Congress should protect worker health and safety with the same level of commitment that it devotes to preservation of the environment. Donahue urged the committee to approve the labor-backed OSHA reform legislation.

Representatives of major employer associations, such as the National Association of Manufacturers (NAM), the Associated Builders and Contractors and the American Iron and Steel Institute, reportedly maintained their opposition to the legislation as drafted, claiming it is too prescriptive to apply to diverse workplaces.

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According to a former OSHA official who testified on behalf of NAM, the deficiencies in the reform legislation include (i) provisions for standard setting which set time frames, mandate certain standards and allow OSHA to regulate chemical risks to a higher degree of worker protection; (ii) hazard abatement provisions which require immediate abatement of the most serious hazards; and (iii) criminal sanctions which subject CEOs and front-line supervisors to penalties absent any intent to injure.

The July 29 hearing was the fourth of six that the committee plans to hold. See *BNA Daily Labor Report*, July 30, 1993.

#### U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

##### [10] Occupational Physicians Endorse EPA Pamphlet on ETS

The American College of Occupational and Environmental Medicine (ACOEM), an organization of some 6,500 occupational and environmental physicians, has reportedly endorsed the EPA's latest publication, *What You Can Do About Secondhand Smoke*. ACOEM has apparently been urging federal agencies to regulate smoking in the workplace since the EPA released its Risk Assessment on ETS in January 1993. Specifically, ACOEM has reportedly asked OSHA to regulate ETS separately from other indoor air issues. See *PR Newswire*, July 23, 1993.

#### U.S. ARMED FORCES

##### [11] Navy Considers Smoking Bans

The Navy's Surgeon General reportedly stated that creating a smoke-free Navy will take more than just ordering sailors to quit smoking. Speaking at a July 29, 1993, news conference, Vice Admiral Donald Hagen indicated that commanders have the authority to impose smoking bans on their ships. He acknowledged that total bans could create a black market for tobacco and may violate individual rights. Studies apparently indicate that some 42 percent of sailors smoke when the troops are at sea. According to Hagen, smoking bans coupled with cessation programs and nicotine patches might reduce the number of smokers in the Navy. See *The Arizona Republic*, July 30, 1993.

#### STATE AND LOCAL GOVERNMENTS

##### [12] ETS-Related State and Local Legislation

###### •Los Angeles, California

Opponents of a Los Angeles ordinance banning smoking in restaurants gathered enough signatures to force a citywide referendum and prevent the measure from taking effect as scheduled on July 26, 1993, but election officials later dismissed the petition drive after reviewing the validity of a random sample of signatures, and the measure took effect August 2. The next day, a coalition of restaurants and smokers reportedly sued the City Clerk, charging she improperly invalidated the petitions.

The ban, which applies to some 7,000 restaurants, was adopted June 23 by the City Council and signed by then-Mayor Tom Bradley. It exempts bars, nightclubs and outside dining areas only. Proponents of the measure support it by citing the EPA Risk Assessment on ETS and other reports. Opponents of the ordinance say it will cause tourists and local patrons to dine in nearby cities with more lenient smoking laws.

About 96,000 signatures opposing the ban — almost twice the number needed to force a referendum — were presented to the city on July 24. The petitions were dismissed on August 2, and the ban took effect immediately. Election officials reported that they randomly sampled 4,878 signatures. Of that total, the number of valid signatures was placed at 2,082. A total of 2,624 valid signatures was needed to require a review of all signatures.

But an attorney for the Hospitality Coalition, a group of restaurants and hotels, claims that nearly 1,200 signatures were wrongly invalidated, according to a newswire report. "We never dreamed the clerk would do something like this," the attorney was quoted as saying. "Our position is that people cannot have their signatures summarily dismissed because of errors committed by the guy carrying the clipboard."

The battle over the ordinance has attracted national attention. This summary is based on reports from the *Los Angeles Times*, *National Public Radio*, *United Press International*, *The Associated Press*, *The Washington Post*, *CNN* and *CBS*. The reports are dated between July 21 and August 3, 1993.

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In its coverage of the ordinance, the *Los Angeles Times* reported that of the 56 cities and counties across the nation that have banned smoking in restaurants, 49 of them are in California.

#### •Other Local Governments in California

San Francisco Supervisor Angela Alioto has made a proposal to ban smoking in all workplaces, including restaurants, and at Candlestick Park. There has not been any published report of council activity on the proposal since it was announced on July 19, 1993. See *The San Francisco Chronicle*, July 20, 1993.

Meanwhile, a number of communities near Los Angeles have joined that city in banning smoking in restaurants and other public places.

*Long Beach.* The Long Beach City Council gave final approval on July 28, 1993, to an ordinance banning smoking in restaurants and requiring that two-thirds of the seating in bars and outdoor eating areas be reserved for nonsmokers. It also makes cafeterias, bowling alleys, bingo parlors, hair salons, hotel lobbies and other public places smoke free. See *Los Angeles Times*, July 29, 1993.

*Pasadena.* On July 27, by a vote of 4-2, the Pasadena City Council approved an ordinance banning smoking in restaurants. The law could go into effect as early as mid-September. Bars attached to restaurants will have a year to phase in the ban. The two councilmen who voted against the measure have accused their colleagues of violating the state's open-meetings law in approving the ordinance, but apparently no formal challenge has been made. Press reports indicated that the release of the EPA Risk Assessment on ETS aided the passage of the law. See *Los Angeles Times*, July 28 and 29, 1993.

*Thousand Oaks and Calabasas.* The Thousand Oaks City Council has directed staff to draft a law that would prohibit smoking in the workplace and other public places, and the Calabasas City Council has told its staff to prepare an ordinance banning smoking inside restaurants. The directives reportedly have been prompted by no-smoking ordinances in neighboring communities. See *Los Angeles Times*, July 29 and 30, 1993.

#### •Florida

The Department of Health and Rehabilitative Services has reportedly proposed regulations under Florida's Clean Indoor Air Act of 1985 that would restrict smoking in shopping malls to those areas of restaurants

that have been designated for smoking and have been licensed by the state. Department officials are soliciting input from those who may be opposed to such restrictions. Comments will be received until the end of August 1993, and will be addressed in public hearings scheduled by the state. See *United Press International*, July 29, 1993.

#### •Local Governments in Hawaii

On July 26, 1993, Honolulu Mayor Frank Fasi vetoed a bill that reportedly "would have prohibited smoking in almost all public areas in privately-owned commercial and residential buildings." Fasi said the measure was too restrictive and couldn't be enforced. According to one report, the City Council can vote to override the mayor's veto when it next meets, on August 11. See *The Associated Press*, July 27, 1993.

#### •Local Governments in Texas

A group called Smoke-Free Dallas is preparing to present a draft ordinance to the city's Environmental Health Advisory Commission that would require restaurants, malls, hotels and workplaces to either ban smoking or restrict it to separately ventilated smoking lounges. The group says it plans to present its proposal in the fall. See *Dallas Morning News*, July 28, 1993.

### ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

#### [13] *Butler: Discovery Continues*

On July 30, 1993, plaintiffs filed a motion for protective order to prevent defendants from deposing plaintiff Ava Dean Butler. Defendants deposed four brothers of plaintiff Burl Butler in late July and early August: Dan Butler, Pete Butler, Bill Butler, and Oscar Butler.

Plaintiffs contend that Burl Butler, a Laurel, Mississippi, barber, developed lung cancer as a result of his exposure to environmental tobacco smoke. His wife, Ava Dean Butler, claims loss of consortium. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

#### [14] *Dunn: Defendants' Responses to the Complaint Due*

Defendants are scheduled to respond to plaintiffs' complaint on Thursday, August 12, 1993.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer on June 24, 1991, as a result of her exposure to environmental tobacco smoke at her place of employment (a Veteran's Administration hospital) for the last seventeen years of her life. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

## ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

### PRISON EXPOSURE CASES

*Voth v. Maass*, 1993 U.S. Dist. LEXIS 9894 (U.S. District Court, Oregon) (decided July 2, 1993)

Frank E. Voth, who has filed an action against several cigarette manufacturers, *see* issue 52 of this Report, July 23, 1993, has lost his bid to sue prison officials under the Eighth Amendment for, among other matters, assigning him to dormitory housing where smoking is permitted. In denying numerous motions filed by Voth and in granting the defendants' motion for summary judgment, the court observed that Voth did state a section 1983 claim in relation to his allegations about ETS exposure, but disallowed the claim because Voth had been transferred to a nonsmoking dormitory.

[15] *Jensen v. Gunter*, 1992 U.S. Dist. LEXIS 21603 (U.S. District Court, Nebraska) (decided June 11, 1992)

A U.S. Magistrate Judge has determined that Eighth Amendment rights were violated, in minor part, by prison practices involving double celling of smokers with nonsmokers that led to tensions which created an increased risk of violence. The case was a class action filed by all of the inmates housed or to be housed in the four main housing units of the Nebraska State Penitentiary. The court ordered the defendants to develop a policy which would better classify prisoners

who were to be double celled to prevent violence and protect inmates who receive threats.

### RESIDENTIAL EXPOSURE — CHILD CUSTODY

[16] *Montufar v. Navrot* (Superior Court, Camden, New Jersey) (decided July 22, 1993)

An order has reportedly been entered in family court whereby the mother of a 10-year-old boy has agreed to stop all smoking in her home and automobile so that the boy will not be exposed to ETS. The boy's father requested such an order in a motion filed in June 1993. *See* issue 51 of this Report, July 9, 1993. The father had alleged that the mother and her new husband were chain smokers and were endangering the health of the boy. According to the agreement, the maternal grandparents must also avoid smoking in the child's presence. The father's attorney has reportedly said that this order may be the first of its kind in the area and that the decision represents "a trend that is now irreversible." *See The Philadelphia Inquirer*, July 23, 1993.

According to a press report, studies about the purported health effects of ETS exposure provided the impetus behind the father's motion. He apparently filed the motion after his son suffered two respiratory infections earlier this year. *See South Jersey Courier Post*, July 23, 1993.

[17] *Shumaker v. Andrews*, 1992 Del. Ch. LEXIS 316 (Family Court, New Castle, Delaware) (decided December 3, 1992)

A family court judge has entered an order which gives primary physical custody of a two-year-old boy to his mother and orders her to insist that the child's maternal grandmother "refrain from smoking in the same room with Joseph, so that the threat of secondary smoke is lessened." There is no discussion of the issue in the opinion, and there is no indication what prompted this particular order. The only health issue that was discussed at length involved the mother's allegations that the child returns from visits with his father with diaper rash and diarrhea.

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## WORKPLACE: WORKERS' COMPENSATION CLAIM

- [18] *Employer: Eisner Levy Pollack etc.*, 1993 WL 265224 (New York Workers' Compensation Board) (decided June 19, 1993)

The Workers' Compensation Board has upheld the claim of a paralegal who alleged that poor air quality on the job caused her to sustain chronic mucous membrane irritation and chronic neuro-behavioral symptoms consistent with "tight building syndrome." The Board, after reviewing the evidence presented determined that the claimant had sustained a work-related accident and was entitled to compensation. According to the Board, the workplace had undergone reconstruction which included modification of the ventilation system, and the claimant worked in a cubicle with no windows and poor air quality. Her doctor advised her to seek fresh air at work. Surveys of ventilation conditions at the workplace suggested poor air circulation and a temperature control problem.

## WORKPLACE: HANDICAP DISCRIMINATION, BATTERY, EMOTIONAL DISTRESS

- [19] *Richardson v. Hennly, First Federal Savings and Loan Association v. Richardson*, A93A0680 & A93A0807 (Court of Appeals, Georgia) (decided July 15, 1993)

The Georgia Court of Appeals has determined that a bank employee may try the merits of her complaints against a co-worker and her former employer alleging harm from exposure to her co-worker's pipe smoke. Employee Bonnie Richardson's complaint against her former employer alleges violation of the Georgia Equal Employment of the Handicapped Code, battery and intentional infliction of emotional harm; her complaint against co-worker J.R. Hennly, Jr., contains claims of battery, intentional infliction of emotional distress and interference with contractual relations.

Richardson alleged that Hennly's pipe smoke caused her to suffer nausea, stomach pain, loss of appetite, loss of weight, headaches and anxiety. According to the court, she was hospitalized twice because of her adverse reactions and was terminated from her position after the second hospitalization due to excessive absenteeism. Richardson

claimed that Hennly was aware of her adverse reactions to his pipe smoke, that he smoked near her to annoy her and that he made teasing or offensive remarks regarding his smoking.

In affirming in part and reversing in part the trial court's determinations regarding the defendants' motions for summary judgment, the appellate court (i) rejected a claim that the Workers' Compensation Act provided Richardson with her exclusive remedy; (ii) determined that pipe smoke can constitute an offensive "touching" for purposes of a battery claim; and (iii) agreed with the trial court that proof of difficulty in working and retaining employment at a particular job could meet the statutory definition of a "handicapped individual." The court's decision will send the cases back to Lowndes Superior Court for further proceedings.

According to a press report, when Hennly switched to smoking cigarettes in the fall of 1990 for a brief period of time, Richardson's symptoms subsided until Hennly resumed smoking his pipe. See *Fulton County Daily Report*, July 21, 1993.

## CIVIL RIGHTS VIOLATIONS

- [20] *Brown v. Costello*, 1993 U.S. Dist. LEXIS 10104 (U.S. District Court, Northern District, New York) (decided July 15, 1993)

The U.S. District Court has dismissed, in part, a pro se complaint involving a claim for damages for exposure to ETS filed against several attorneys and various local and state officials and governing bodies. The complaint alleged, among other matters, that one of the plaintiffs, who had been incarcerated on a contempt of court charge, was forced to inhale cigarette smoke in violation of New York Public Health Law § 139-n and that such inhalation of ETS constituted denial of due process, trespass and battery.

Finding that the complaint was devoid of any factual allegations against the attorney defendants who had filed a motion for judgment on the pleadings, the court dismissed the complaint as to these defendants and refused the plaintiffs' untimely request to amend. The claims against the other defendants are still pending.

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## CRIMINAL BATTERY

### [21] Smoker Charged with Battery after Disagreement with Hotel Clerk

According to a press report, a 24-year-old woman was charged with battery after allegedly pushing a hotel clerk who was attempting to enforce a no-smoking policy. Marjorie Kain of Aurora, Illinois, was apparently arrested on July 17, 1993, and released on her own recognizance. A hearing was reportedly scheduled on the charge for August 5, 1993, in Kane County Circuit Court. See *Chicago Tribune*, July 20, 1993.

## LEGAL ISSUES AND DEVELOPMENTS

### [22] "The Call for State Legislation on Environmental Tobacco Smoke in State Prisons," L.M. Galbraith-Wilson, 13 *Hamline Journal of Public Law and Policy* 335 (1992)

The article examines the issue of ETS exposure in prisons and concludes that, in spite of the fact that some 70 percent of prison inmates smoke, smoking should be banned to protect prisoners' eighth amendment rights against cruel and unusual punishment. The author cites a draft version of the EPA Risk Assessment on ETS to support her claims that ETS poses a health risk to nonsmokers. She also discusses several of the prisoner ETS cases that have been decided by the federal courts in recent years.

### [23] "Dangerous Products and Injured Bystanders," R.F. Cochran, Jr., *Kentucky Law Journal*, 81: 687-725 (1992-93)

This article, written by a Pepperdine University School of Law Professor, suggests that the manufacturers of inherently dangerous products that are not used by a majority of the population, such as cigarettes, should be liable to bystanders for the injuries caused by those products. The basis for this suggestion is that bystanders are subjected to "unreciprocated risks" by the manufacturers of goods they have not purchased or used, and compensating them for their injuries would spread the costs of such injury to the consumers who help to create the risk.

Citing the EPA Risk Assessment on ETS, the author claims that the evidence is clear that ETS causes lung

cancer in bystanders and states, "It may be that tobacco manufacturers (through liability) and consumers (through higher prices) should be responsible for the risks that they cause others." The author believes that a bystander liability theory is especially apt in ETS cases because bystanders will be unable to bring suit against the users of the products that cause their injury under a negligence or abnormally dangerous activity theory because they have typically been "subjected to a lifetime of second-hand smoke by many smokers."

## OTHER DEVELOPMENTS

### [24] Smokers' Rights Group Plans March on Washington

The Individual Rights Association, a smokers' rights advocacy group, reportedly held a news conference on July 30, 1993, in Washington, D.C., to announce plans for a "march on Washington." Evidently, the march is being organized as part of the group's agenda to change what the group perceives as the present course of discrimination against smokers. See *The Reuter Washington Report*, July 30, 1993.

### [25] Health Service Releases Job Injury Survey

According to a press report, the U.S. Public Health Service released the results of a survey on July 27, 1993, showing, among other matters, that the percentage of workers who smoke has decreased by 19 percent in the last decade. Two out of five individuals surveyed reportedly said that smoking is permitted in their workplace, regardless of complaints by nonsmokers, and 55 percent said smoking is not permitted in their workplaces. See *PR Newswire*, July 27, 1993.

### [26] Fast Food Franchisee Adopts Smoking Ban

A Popeyes Famous Fried Chicken & Biscuits franchisee has reportedly banned smoking in all of its 20 restaurants in the Washington, D.C. area. The new policy was apparently introduced early in July 1993, after the franchisee determined that very few people smoke during their meals. The parent company has indicated that it will track the experiment to see if the policy should be expanded to other markets. According to a representative of the parent company, Popeyes

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